In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. ~~5436~~ 5021

DAVE NIELSEN, CHARLES NIELSEN, and JAMES E. REECE, *Plaintiffs in Error.*

vs.

UNITED STATES OF AMERICA, *Defendant in Error.*

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

HON. EDWARD E. CUSHMAN, *Presiding Judge.*

Brief of Defendant in Error

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STATEMENT OF THE CASE

The above named plaintiffs in error were, together with one Noland Nelson, indicted for conspiring to violate the National Prohibition Act and certain revenue statutes of the United States. (Tr. p. 2).

The Government dismissed the cause as against Noland Nelson and the plaintiffs in error were brought to trial.

The Government's evidence was to the effect that on May 18, 1926, Prohibition Agents Croxall and Lambert, accompanied by deputy sheriffs, went by automobile to a point about two miles north of the Rainier National Park on the main road to that park. At that point they turned to the right onto a plank road which ends at the Nisqually River. At the end of this road the party found an old abandoned lumber camp, consisting of a number of shacks, a garage and a barn. (Tr. pp. 30, 53).

In the garage, which was open at both ends, the party found a Master Six Buick touring car, bearing Washington 1926 license No. 111-205, and a Ford touring car with Pierce County temporary license No. 5683. (Tr. pp. 31, 32, 59). The Buick touring car was shown to belong to DAVE NIELSEN. (Tr. p. 57). The Ford was owned by JAMES E. REECE. (Tr. p. 57). The back seats of both of these cars were missing. In the bottom of the Ford car and in the back thereof was found some fine cornmeal of the same kind as was later found at the still. (Tr. pp. 32, 59).

The rear end of the Buick automobile contained a rug with fringe on the edges. On this rug and on the carpet in the bottom of the car was lint of the sort which comes from gunnysacks. (Tr. p. 31).

In the barn on the premises a Chevrolet roadster was found which bore Washington 1926 license No. 111-206. This was shown to belong to CHARLES NIELSEN. (Tr. p. 57). Under the seat of this car a sugar sack was found, bearing the mark "Sea Island Sugar." (Tr. pp. 32, 54). Twelve empty "Sea Island Sugar" sacks were found along side of the automobile in the barn. These were covered by an old mattress which had apparently been but recently placed there, for there were no dust marks upon the mattress. (Tr. p. 32). On the sawdust in the barn and near this car was the imprint of two kegs. (Tr. p. 32). In the back of the Chevrolet further, some cornmeal was discovered, loose, of the sort also found in the Ford. (Tr. p. 32).

Government's evidence further showed that "Sea Island" sugar is an unrefined cane sugar of coarse grade. (Tr. p. 33).

The agents and the deputy sheriffs discovered fresh footprints in the sand and mud, it having rained the

night before, which led both from the garage and the barn down to a log crossing the river.

From the opposite end of the log across the river, fresh tracks led to a trail. (Tr. p. 30). Agent Croxall and Deputy Sheriff Jeffery followed this trail into the woods, with Croxall leading, for about fifty feet.

As these officers approached the edge of "Big Creek," which parallels the Nisqually, Croxall heard someone shout "Look out," and at this time several men ran into the woods. Two of them were pursued by Croxall, who shouted to them to stop, and who fired two shots into the air in an endeavor to halt them, but the men escaped. The officers made a search but were unable to find the men. (Tr. p. 30).

Returning to the trail Agent Croxall rejoined Deputy Sheriffs Jeffery and Badyala, who had discovered a still of three hundred fifty gallons capacity on the bank of Big Creek.

At the still there were two 1,000 gallon tanks of cornmeal and sugar mash. One tank of mash was in a high state of fermentation. The other tank had just been set and the cornmeal therein had not all been absorbed into the liquid, but some of it was still dry and floating

on the top. (Tr. p. 31). This cornmeal was of the same sort as that found in the bottom of the Ford touring car and the Chevrolet roadster. (Tr. p. 82).

Four 100 pound sacks of Sea Island Sugar were under a tree near the tanks. There were also three 52 gallon barrels, one containing about two gallons of whiskey and the other about four. (Tr. p. 31).

The still was hot but only contained water and was not in operation.

The officers destroyed the entire plant by burning the same. After this, they returned to the cabins on the west side of the Nisqually River and closely examined the automobiles, the trails and the tracks leading from the car to the still. (Tr. p. 31).

At the still, the officers observed a brindle bulldog. When the officers had returned to the cabins, this bulldog came to the first cabin and entering the same went under the table. He was wet at the time, indicating that he had swum across the river. Tr. pp. 33, 36).

In this cabin were a number of camping supplies, some fishing tackle, some tools and bedding, and a number of papers. The fishing basket was full of No. 10 corks, the kind used for kegs. There was also in this cabin about twenty pounds of the same variety of Sea

Island sugar as had been found at the still. The name of JAMES E. REECE was found on an automobile license in one of the coats hanging on the wall and there were a number of papers and letters in the coat indicating that JAMES E. REECE had occupied this cabin. (Tr. pp. 32, 54, 61).

Under the back portion of this cabin and in plain sight from the rear of the building were two gallon whiskey jugs which contained a few drops of liquor and smelled strongly of moonshine whiskey. (Tr. p. 32).

Immediately to the rear of this cabin and about fifty feet from the back door, Deputy Sheriff Mohrbach found a gunnysack about half full of copper clippings and small pieces of copper of the same kind as had been used in the manufacture of the still found across the river. (Tr. p. 51). In the second cabin, which was the one occupied by Noland Nelson, who was dismissed from the cause, the party found a half pint of moonshine whiskey, and on the bed an empty quart bottle that smelled of moonshine whiskey and had a few drops in the bottom. (Tr. p. 34).

The moonshine whiskey in the bottle was identified by Agent Croxall as having a peculiar taste and being

identical in taste with whiskey which he had tasted some two years before, which last mentioned whiskey was manufactured, to Agent Croxall's knowledge, by the defendant DAVE NIELSEN. (Tr. pp. 34-38).

ARGUMENT.

After consideration of this evidence, the jury returned a verdict of guilty as to the three defendants who are plaintiffs in error here.

Plaintiffs in error on page 25 of their brief argue their assignments of error under the following three points:

First, that the trial court erred in admitting the evidence concerning the bottle of whiskey found in the home of Noland Nelson.

Second, that the court erred in allowing introduction of the testimony concerning the prior manufacture of liquor by defendant DAVE NIELSEN.

Third, that the court erred in refusing to permit the witness Austin to testify on behalf of DAVE NIELSEN to the effect that the latter was going fishing on the day before he was at the still.

Fourth. A fourth assignment of error which is argued on behalf of plaintiffs in error CHARLES NIELSEN and REECE is to the effect that the court erred in refusing to sustain the challenge to the sufficiency of the evidence in the close of the Government's case.

Let us discuss these alleged errors in the order in which they appear in counsel's brief.

UNLAWFUL SEARCH AND SEIZURE

A discussion of the validity of the search of NOLAND NELSON'S shack and the seizure of the bottle of moonshine (Government's exhibit 3), seems to us quite unnecessary. None of these plaintiffs in error made any motion for the suppression of this evidence in advance of trial. No objection was made by these defendants to the introduction in evidence of Government's Exhibit No. 3 at the time of trial and there is no assignment of error predicated upon its reception in evidence. The only assignment of error based on the introduction, at the time of trial, of Government's Exhibit No. 3 refers to the refusal of the court to allow

cross-examination of a Government witness as to whether the witness had a search warrant when he entered Noland Nelson's house. (Assignment of error No. 1).

This cross-examination was obviously immaterial. Further, as stated, there having been no lack of opportunity to present the matter in advance of trial, the court quite properly did not allow the collateral issue to be raised upon trial in this fashion.

The Supreme Court of the United States in the recent case of *Segurola vs. U. S.*, decided November 21, 1927, says:

"Moreover, the principle laid down by this court in *Adams v. New York,* 192 U. S. 585, and recognized as proper in *Weeks v. United States*, 232 U. S. 383, 395, and in *Marron v. United States*, No. 185, October Term, 1927, decided this day, applies to render unavailing, under the circumstances of this case, the objection to the use of the liquor as evidence based on the Fourth Amendment. This principle is that, except where there has been no opportunity to present the matter in advance of trial, *Gouled v. United States*, 255 U. S. 298, 305; *Amos v. United States*, 255 U. S. 313, 316; *Angello v. United States*, 269 U. S. 20, 34, a court, when engaged in trying a criminal case, will not take notice of the manner in which witnesses have possessed themselves of papers or other articles of per-

sonal property, which are material and properly offered in evidence, because the court will not in trying a criminal cause permit a collateral issue to be raised as to the source of competent evidence. To pursue it would be to halt in the orderly progress of a cause and consider incidentally a question which has happened to cross the path of such litigation and which is wholly independent of it."

It is true that in this case Noland Nelson petitioned for the suppression of the evidence. He, however, was dismissed prior to trial, and the evidence was never used against him. These plaintiffs in error do not claim to have lived in Noland Nelson's house and none of them assert that the bottle of liquor (Government's Exhibit No. 3) belonged to them. As a consequence, they are not in position to raise any question concerning the legality of the search and seizure.

In *U. S. v. Wexler* (D. C. N. Y.), 4 Fed. (2nd) 391, for instance, it was held that if the premises of one conspirator have been unreasonably searched, he alone can complaint and the property is admissible against all other defendants.

The principle is rather aptly stated in *Chicco v. U. S.* (C. C. A. 4), 284 Fed. 434, 436, where the court says:

"* * * and even conceding that a search of the latter premises would have been illegal and violative, as against the owner or occupant thereof, of the constitutional inhibition against unlawful search and seizure, still, as was said in the *Silverthorne* case (D. C.) 265 Fed. 857, the prohibition there contained (Fourth and Fifth Amends. U. S. Const.) is for the benefit of the person or individual whose rights have been invaded, and, if that be correct, the only person who could have invoked this protection was the owner of the property, the elder Chicco, and certainly not the person who had unlawfully and clandestinely occupied it as a cache for contradand liquor."

This principle is firmly established in the adjudicated cases. See for example the following:

Graham v. U. S. (C. C. A. 8), 15 Fed. (2nd) 740, 742;

Armstrong v. U. S. (C. C. A. 9), 16 Fed. (2nd) 62, 65;

Lewis v. U. S. (C. C. A. 9), 6 Fed. (2nd) 222;

U. S. v. One Buick Automobile (D. C. Vt.), 21 Fed (2nd) 789, 790;

U. S. v. Murray (D. C. Cal.), 17 Fed. (2nd) 276;

U. S. v. Gass (D. C. Pa.), 17 Fed. (2nd) 996;

U. S. v. Mandel (D .C. Mass.), 17 Fed. (2nd) 270, 273;

Rosenberg v. U. S. (C. C. A. 8), 15 Fed. (2nd) 179;

Schwartz v. U. S. (C. C. A. 5), 294 Fed. 528;

McDaniel v. U. S. (C. C. A. 6), 294 Fed. 769, 771;

Remus v. U. S. (C. C. A. 6), 291 Fed. 501, 511;

Lusco v. U. S. (C. C. A. 2), 287 Fed 69;

Haywood v. U. S. (C. C. A. 6), 268 Fed. 795, 803, 804.

Accordingly, the question of unlawful search and seizure in this case is a moot question and not a proper one for review by this court.

TESTIMONY CONCERNING PRIOR OFFENSE BY DAVE NIELSEN.

Under this heading of their brief counsel indulge in a few excursions out of the record, an attack on the credibility of a Government witness and a citation of

several cases to the effect that evidence of other offenses committed by a defendant is ordinarily inadmissible. With reference to the credibility of the witness, that was for the jury, and the jury believed the Government witness, the expert testimony of counsel concerning human inability to distinguish different manufactures of moonshine whiskey to the contrary notwithstanding.

With the cases cited by counsel on this point, likewise, we have no quarrel. They announce a proposition of law which is well settled. Equally well settled, however, is the exception to the rule enunciated by those cases: that, where a circumstance is relevant for some purpose, the incidental revelation, in offering it, of other criminal conduct by a defendant does not stand in the way of receiving the evidence.

Many cases showing the admissibility of the testimony to which objection was here made are collected and approved in: I. WIGMORE on EVIDENCE (2d Ed.) page 761. See also the cases collected in the same volume at pages 464, 465.

The principle announced by these cases is that in the matter of establishing the identity of an accused, rele-

vant evidence is not to be excluded because it incidentally shows the commission of some other offense by the accused.

So, here, Government's Exhibit No. 3 was in evidence. Certain circumstantial evidence tended to show that the moonshine whiskey contained in Government's Exhibit No. 3 was manufactured by defendant DAVE NIELSEN. Under these circumstances, the fact that this moonshine had a peculiar flavor and that whiskey manufactured by the same defendant at a prior time had, to the knowledge of an expert Government witness, the same peculiar flavor, was most relevant evidence as to the identity of the accused. It was properly admitted.

Counsel for plaintiffs in error on page 37 of their brief, indulge in the assertion that they are experts and are prepared to assert that all Western Washington moonshine has the same flavor. The difficulty with this assertion is that it is out of place. Counsel should have been sworn as experts and should have offered their testimony upon the trial. Such testimony would then have been under oath and some opportunity would have been afforded as well for cross-examination con-

cerning the extent of their experience. The assertion has no place in a brief.

As Mr. Wigmore says (I. WIGMORE on EVIDENCE, 2nd Ed., page 757), the evidence of identity should be admitted ordinarily—as it was in this case—leaving it to the defendant to show that the identifying characteristic is possessed by many other objects, if it be so claimed. Counsel did not see fit to present any such evidence. If they had it, they were derelict in their failure to produce it. At any rate, there was no error in the admission of this testimony to establish the identity of this moonshine as having been manufactured by DAVE NIELSEN.

Further, counsel have not seen fit in their brief, to direct attention to the cautionary instructions given by the court at the time of the ruling which is the basis of this assignment of error. As a matter of fact, the court in overruling their belated objection gave the following instruction to the jury (Tr. p. 38):

"The jury will understand that you cannot convict a man of one crime when he is being tried for another crime. All this evidence is going in for and is allowed to go in for is to show, if the prosecution can show it, as being one of the circumstances in the case; that this

liquor is similar to liquor which had theretofore been manufactured by the defendant DAVE NIELSEN."

Having put much in their brief which is not in the record, one wonders why this cautionary instruction was deleted.

REFUSAL OF COURT TO RECEIVE STATEMENTS EXPLANATORY OF ACTS.

Under this heading counsel complain because the court directed the jury to disregard a statement which defendant DAVE NIELSEN is said to have made, a day before the discovery of the operation of the still by Government officers.

S. W. Austin, a witness for the defendants, testified that on the 17th of May, DAVE NIELSEN purchased some groceries and fishing tackle from the witness. Austin further testified that NEILSEN, at the time of making the purchase stated that he was going fishing. Upon motion by the United States Attorney, the court instructed the jury to disregard what NIELSEN said to Austin. (Tr. p. 74). This is urged as error.

In arguing this assignment counsel set forth a quotation from Mr. Wigmore's work on Evidence. (Brief p. 41). Mr. Wigmore himself, however, is an authority opposed to the contention of counsel. The statement was, on its face, self-serving and hearsay. As such, it should be excluded, unless admissible under some recognized exception to the hearsay rule.

Counsel seek to bring the matter within the exception which allows the introduction of hearsay statements when they are part of the *res gestae.* In III. WIGMORE on EVIDENCE (2nd Ed. p. 783), that learned author sets forth the limitations on this exceptions to the hearsay rule, as follows:

"These considerations point out the four simple limitations which attend this use of utterances as verbal acts, namely:

(1) The conduct to be characterized by the words must be independently material to the issue;

(2) The conduct must be equivocal;

(3) The words must aid in giving legal significance to the conduct;

(4) The words must accompany the conduct."

It will be seen at once, that the testimony ordered stricken in the instant case does not fall within the field defined by the foregoing limitations. In the first

place, the conduct of the defendant, *i.e.*, the purchase of the fishing tackle—was not independently material to the issue, as required by the first of Mr. Wigmore's qualificaitons.

Secondly, the conduct was not equivocal, as required by the second limitation.

Thirdly, the words do not aid in giving legal significance to the conduct. It would naturally be supposed that a man who purchased fishing lines intended to use them for fishing. No different legal significance was attached to this act by the alleged words of NIELSEN.

Consequently it seems that these words satisfy only the fourth of the requirements of Mr. Wigmore, and were properly withdrawn from the consideration of the jury. In any case, it is difficult to believe that a different ruling could have made any difference in the verdict. (See JUDICIAL CODE, Sec. 269).

INSUFFICIENCY OF EVIDENCE.

We believe that a review of the evidence as set forth in the brief resume at the beginning of this brief shows

clearly that there was ample justification for the verdict of the jury in this case. The evidence, to be sure, was largely circumstantial, but two of plaintiffs in error took the stand in their own behalf and offered their explanation. As the Supreme Court said in the *Segurola* case, *supra*, the jury evidently thought that they protested too much and destroyed their credibility.

However that may be, no question as to the sufficiency of the evidence is before this court. No motion to direct a verdict was made at the conclusion of all of the evidence. The defendants waived the motion they made at the close of the Government's case in chief by introducing evidence themselves.

Nelson vs. U. S. (C. C. A. 8), 18 Fed. (2nd) 522, 524;

Critzer v. U. S. (C. C. A. 9), 8 Fed. (2nd) 266;

Marron v. U. S. (C. C. A. 9), 8 Fed (2nd) 251, 258;

Goldberg v U. S. (C. C. A. 5), 297 Fed. 98, 101;

Andrews v. U. S. (C. C. A. 9), 224 Fed. 418.

From the foregoing cases it is clear that no review of this evidence by this court would be proper.

Counsel have also assigned as errors, the denial of the motions for new trial and in arrest of judgment. These are not separately discussed in the brief and in any event, the rulings of the trial court with reference thereto are not subject to review.

With reference to the motion for new trial, this court has repeatedly so held. See the cases collected in *Brownlow v. U. S.*, 8 Fed. (2nd) 711, 712, and in *Brown v. U. S.*, 9 Fed. (2nd) 588, 590.

A motion in arrest of judgment ordinarily raises questions apparent on the face of the record alone, not including evidence. A ruling on such a motion likewise is not subject to review.

Critzer v. U. S. (C. C. A. 9), 8 Fed. (2nd) 266;

Gouled v. U. S., 273 Fed. (C. C. A. 2), 506;

Beyer v. U. S., 251 Fed. (C. C. A. 9), 39;

Andrews v. U. S., 224 Fed. (C. C. A. 9), 418.

We respectfully submit therefore, that no reversible error exists in the record in this case, and that the plaintiffs in error were properly found guilty. Accordingly the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

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